Appeal No. UKEAT/0377/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 February 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

ADVANCED COLLECTION SYSTEMS LIMITED APPELLANT

MISS Y GULTEKIN RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LLOYD MAYNARD (of Counsel) Instructed by: Threthowans LLP The Pavilion Botleigh Grange Business Park Hedge End Southampton SO30 2AF
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

JURISDICTIONAL POINTS

PRACTICE AND PROCEDURE - Costs

The Claimant alleged unfair and/or wrongful dismissal, arising out of a resignation which the Employment Appeal Tribunal found had been made without any notice, and where there had been no repudiatory breach by the employer. Accordingly, the Claimant was not entitled to any award of compensation for unfair dismissal, nor for wrongful dismissal, and had no legitimate claim for moneys due in the notice period (since in breach of contract she had simply left). She withdrew her claim for notice pay during the hearing. In fact, in advance of the hearing she had benevolently been paid a sum in lieu of notice, and her full holiday pay entitlement. The Judge awarded £1,800 at the hearing because the employer had not provided a statement of terms and conditions of employment under section 1 of the **Employment Rights Act 1996**, and £150 by way of fee reimbursement because the Claimant had partially won her case. He declined to reconsider his decision (on the basis that section 38 of the **Employment Act 2002** required the Claimant to have succeeded in a claim, or a finding of fact to have been made in her favour, before any such award could be made) saying that the withdrawal of a justified claim by a claimant amounted to a finding of fact by a Tribunal in her favour.

Held: The Claimant had no justified claim; she had lost her case; and there was no jurisdiction to make an award in respect of the admitted failure of the employer to observe section1 **Employment Rights Act 1996**. Even if the claim had not been justified (rather than hopeless) a withdrawal could not be equated to a finding in her favour, which is what the section specifically required. Insofar as the policy underpinning the statute could be ascertained, in any event it was better served by the opposite interpretation to that which the Judge thought appropriate. Appeal allowed, with reimbursement of the appeal fees.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision made at Watford by Employment Judge Jack on 30 April 2014 in respect of which he subsequently refused to reconsider the Judgment. The essential facts were that the Claimant worked for the Appellant employer, which was a debt collection agency. She resigned. She claimed that her resignation had been caused by the repudiatory breach of contract towards on her on behalf of a Mr Eaves of the employer. The Tribunal rejected that contention. It acquitted Mr Eaves of the bullying and intimidation which had been alleged against him. It rejected the case that there had been any repudiatory conduct. However, during the course of the hearing, it had become apparent, though it was not particularly flagged up in the ET1, that there had been a failure by the employer to provide the Particulars of Employment required by section 1 of the **Employment Rights Act 1996**. It was accepted by the employer that there had been such a failure.

2. In dealing with that, the Tribunal did not address section 38 of the **Employment Act 2002**, to which I shall come. It said simply, at paragraph 29.7 and 29.8:

> **"29.7. Were the terms set out … such as to satisfy section 1 of the Employment Rights Act 1996? No.**
>
> **29.8. If not what should the remedy be. In the current case there has been a long period of failure to remedy the absence of terms after the respondent was aware of the need to remedy that defect. In my judgment this is a bad case and it is appropriate to award the maximum of four weeks' salary amounting to £1,800."**

3. The hearing then proceeded to the question of costs, amounting in this case to the reimbursement of the fees paid in order to bring the Tribunal claim. The Judge said:

> **"30. After delivering the reasons for the judgment the claimant applied for the costs payable to the tribunal. These comprise the £250.00 issue fee plus the hearing fee but the hearing fee has not actually been paid yet because there is an outstanding claim by the claimant for remission from the liability to pay that fee. Mr Maynard on behalf of the respondent submitted that there should be no order for costs because the claim in respect of the failure to provide particulars was only made in the ET1 and that the respondent had won on the largest aspect of the claim.**

> **31. In my judgment I have to exercise a discretion; the claimant has had some success, the amount she has been awarded of £1,800.00 is not a small sum of money and it is appropriate to make some award of costs. In my judgment the figure of £150 is appropriate."**

The Law

4. The jurisdiction to make an award in respect of a failure to provide particulars under section 1(1) of the **Employment Rights Act 1996** arises under section 38 of the **Employment Act 2002**. It provides, so far as material, as follows:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.**
>
> **(2) If in the case of proceedings to which this section applies -**
>
> > **(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and**
> >
> > **(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change),**
>
> **the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.**
>
> **(3) If in the case of proceedings to which this section applies -**
>
> > **(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and**
> >
> > **(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,**
>
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead."**

Subsection (4) deals with the minimum amount. Subsection (5) provides that the duty under subsections (2) or (3) does not apply if there were exceptional circumstances which would make an award or increase unjust or inequitable.

5. The jurisdictions listed in Schedule 5 include the jurisdiction under section 111 of the **Employment Rights Act 1996**, which provides for jurisdiction in cases where unfair dismissal is alleged, and cases brought under the **Employment Tribunals Extension of Jurisdiction**

(England and Wales) Order 1994, providing jurisdiction in cases where a breach of an employment contract and termination are alleged.

6. Accordingly, there are two circumstances in which a Tribunal must make such an award in such a case: first, if it finds in favour of the employee but makes no award, and secondly, if it does make an award. Plainly, in that second respect, it has also made a finding in the employee's favour.

7. The employer argues on appeal that there was here no claim which gave rise to any entitlement under section 38. The claim which the Claimant had advanced relating to unfair dismissal was dismissed. She could have no claim for any consequential loss because, by resigning on the spot, as the Tribunal found she had done, she was resigning without giving notice. She was herself, therefore, in breach of contract. That would not affect any claim for moneys due to her in respect of work she had performed prior to her resignation, subject only to any damages which the employer might legitimately claim in respect of her own breach of contract by resigning when she did, without notice. That does not arise as an issue here.

8. The Judgment on application for reconsideration, promulgated on 14 July 2014, refused the application on the following basis:

> **"2. The grounds of the application are that no award should have been made under s.38 of the Employment Act 2002 because the claimant had not succeeded on any complaint falling within schedule 5 of that Act.**
>
> **3. I have no note of this submission being made at the hearing of this matter, but that does not prevent the respondent from taking the point subsequently as they are now doing.**
>
> **4. When the claimant issued proceedings in the employment tribunal, she had a justified claim for payment of notice monies. Such a claim lies under s.24 of the Employment Rights Act 1996 or under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994, both of which are listed in schedule 5.**
>
> **5. That complaint was withdrawn after the respondent paid the notice monies. That is a "favourable" outcome for the claimant. The issues is [sic] then whether in such a case "the employment tribunal finds in favour of the employee" under s38(2)(a). On a literal reading there is no "finding" by the tribunal at all.**

6. Nonetheless, there is a general principle of law that once a judicial body is properly seized of the matter, subsequent events will not take away that body's jurisdiction. In the claimant's case, it would be strange if the claimant's well-founded complaint under s.38 were lost by reason of the respondent's subsequent payment of the notice monies.

7. In my judgment it is a proper interpretation of s38(2)(a) of the 2002 Act to treat a dismissal of a complaint on withdrawal as a finding in favour of a claimant, where the reason for the dismissal on withdrawal is payment by the respondent."

Discussion

9. There are a number of problems with this Judgment, which I take to add to the Reasons which the Judge had for his initial determination. It should be noted that if he is right in paragraph 3 in his Reconsideration Decision, then he did not consider section 38 at all at the time of his initial Decision. Plainly he should have done, but in any event I am satisfied, having seen a copy of Mr Maynard's skeleton submissions, which it is agreed between the parties were put before the Judge, that he was directed clearly to section 38, the terms of which were set out in those submissions.

10. As to paragraph 4 the Claimant did not have a justified claim for payment of notice moneys. As I have noted, her resignation, being immediate, was in breach of contract. She did not work out her notice. She could not legitimately have claimed in contract for the payment to her of notice moneys. It follows that in paragraph 6 the Judge's assumption that the Claimant's complaint was well-founded was erroneous.

11. A second difficulty with the Decision is that the Judge said, without having invited further submissions, that the complaint made by the Claimant of a failure to pay notice pay was withdrawn after the Respondent paid the notice moneys. The last sentence of paragraph 6 suggests that the Judge had it in mind that the claim was issued before the money was paid by the employer.

12. Mr Maynard has shown me that in fact that was wrong. The claim was not issued until 21 January 2014. It was on 22 October 2013 that the Claimant resigned. On 6 November 2013 the employer wrote to her. In the course of the letter it said:

> **"Although you left without working your notice and we are not obliged to do so, we will pay you in lieu of notice up to 22nd November 2013."**

That was a generous action on behalf of the employer, which was subject to no legal liability to make that payment.

13. The Claimant in e-mails subsequent to that complained that she had not been paid in respect of holidays. In calculating those holidays she included the holidays which would have accrued had she worked through her notice period in respect of which she had already been given pay in lieu of notice. On 20 December 2013 the employer recorded that it had paid the Claimant in respect of holiday pay and it paid her for the additional sums she asked. There therefore was no outstanding claim on the face of that material which was due to the Claimant. When the ET1 was issued after this, it did not set out the claim with any specificity. In paragraph 6.3 it recorded that the Claimant had not worked or been paid for a period of notice. It claimed wrongful dismissal, thereby making a monetary claim but not in respect of outstanding holiday pay, and was met in any event with an ET3 in which, in paragraph 19, is contained this:

> **"The Claimant, despite resigning with immediate effect, was paid in lieu of her notice. As such, it is denied that the Claimant is owed notice pay or any other pay from the Respondent."**

In the teeth of that, the Claimant sought at the Tribunal to withdraw her claim. There never was any proper claim for any sum on the basis of that material.

14. Accordingly, in this particular case, there was no jurisdiction to make any award under section 38 because there had been no finding in favour of the employee, however that term is construed, by the Tribunal which related to a claim under any of the jurisdictions listed in Schedule 5.

15. It is, therefore, unnecessary for me to consider whether the Judge was entitled to take the view he did, as expressed in the Reconsideration Decision, that a "finding in favour" by a Tribunal was in the light of the purpose underlying section 38 such as to encompass a case in which a Claimant withdrew, where the Claimant had been paid in respect of her claims. If the matter had turned on this particular question, whether the Judge was entitled to reach that conclusion, I would unhesitatingly have found that he was not. My reasoning is this. The words used by Parliament are specific. They refer to a Tribunal "finding in favour of the employee". The wording is not, as it might have been, such as "where Tribunal proceedings are resolved in favour of …" or any similar expression. What is required by Parliament is an actual finding, a decision of the Tribunal in favour of the employee. A decision to accept withdrawal, if one is made, or to dismiss a case on withdrawal, does not sensibly fit within that description. The Judge recognised this. He, however, did not apply the literal reading he thought appropriate but, without reasoning, thought it a proper interpretation to treat the dismissal of a complaint on withdrawal as a "finding in favour".

16. This would be tenable if the policy underlying section 38, and in particular the policy underlying the selection of the words requiring a finding in favour of an employee by a Tribunal, were clear. I find it difficult to understand precisely what the policy was in specifying that there must be a finding in favour of an employee, but the words are specific. In the absence of any clear policy I do not think that the Judge was entitled to apply either the

mischief or the golden rule of construction, which he appears to do. A purposive construction cannot be adopted without being clear as to the purpose, for without that there is no point of reference.

17. I investigated the purpose so far as I could with Mr Maynard. The Claimant herself did not appear to resist the appeal in person, though referred me to her Skeleton Argument, to which I shall come in due course. He submitted that the purpose behind the provision as a whole was penal, designed to facilitate dispute resolution. Where an employer had been in breach, therefore, of the requirements of section 1 or section 4, the fact that if matters proceeded to a conclusion at the Tribunal, the Tribunal would be obliged to add at least two weeks and possibly four weeks' pay to the award which they might make, would act as an incentive to the employer to settle matters which, though arguable, were disputed between the parties. In that way, though penal if matters proceeded to an outcome, the provision also provided an incentive to an employer to reach a financial compromise with a Claimant. Although this would particularly be the case where the rights and wrongs of a claim might not be absolutely clear, rather than a case in which they were crystal clear, it seems to me that this may very well be the policy underlying the choice of words in section 38(2)(a) and gives some explanation as to why Parliament might have thought that an actual finding, i.e. one at the conclusion of a case, was to be required.

18. I emphasise, however, that I have heard only the submissions from one party in so thinking, and Mr Maynard's suggestion was made somewhat on the hoof in response to questions from the bench. In any future case, this must be borne in mind in case it should appear, on more detailed consideration, that there may be other purposes which are more persuasive than that which Mr Maynard was able to identify.

19. If, however, he is right in that, as he may well be, then again what is emphasised is not the question whether the proceedings as a whole resulted in a favourable outcome for the Claimant, but rather that there was a real purpose in providing that there should be a specific finding by the Tribunal in favour of the Claimant.

The Claimant's Skeleton Argument

20. The Claimant argues that the court should be respectful of the Judge's decision. She says she represented herself. Therefore she may not have put every argument available to her. The appeal has caused her stress and anxiety. These are real reflections of the effect the process may have on a Claimant, but they do not amount to reasons to reject the appeal.

Conclusion

21. In conclusion, therefore, I am satisfied that the Judge was in error of law in the several respects which I have identified. Even if he had been right in thinking that the claim brought by the Claimant had been settled only after the issue or proceedings rather than beforehand, and had been entirely resolved in her favour so far as notice pay was concerned, he would in any event have been wrong to think that section 38 gave him any jurisdiction to make the award. There was no jurisdiction to make the award under section 38 since there was no finding in favour of the Claimant. The basis, therefore, for his partial award in respect of the reimbursement of fees also falls away.

22. The conclusion is that the appeal is allowed. The claim is dismissed. There is no money outstanding to be paid by the Appellant to the Respondent.

23. There is an application for costs under rule 34A(2A) amounting to the reimbursement of fees of £1,600 paid by the employer to bring the appeal to this Tribunal. The appeal has succeeded in its entirety. Prior to the appeal being launched the solicitors acting for the Appellant asked if the Claimant would be willing to agree to resolve the matter on entering a "drop hands agreement". That was met with a response from a case manager at "employmentlawsrl.com", who had represented the Claimant before the Tribunal, saying:

> **"After speaking to my client and our legal team we can confirm that we are not prepared to drop this and have every intention to defend her position."**

24. On 18 August 2014 Mr Grimshaw of the employers wrote to say that the application to the Appeal Tribunal had been received and the Claimant should have a copy of it, and offered a last opportunity to resolve the matter without EAT fees being incurred. The e-mail noted that following the conclusion of the appeal the Appeal Tribunal would need to determine whether the Appellant should recover its fees from the Respondent. The answer it had was confirmation that "my client does wish to defend your appeal."

25. On 1 December 2014, having issued the appeal, the solicitor acting for the Respondent wrote again, referring to fees and suggesting that the Claimant sought legal advice. As I have noted, she maintained her opposition in principle to the appeal. She continued till today to do so. I have no doubt that in those circumstances it is entirely proper that the Appellant should seek the reimbursement of the costs paid. Those costs should be paid in full.

26. I order, therefore, that the appeal be allowed. The Costs of £1,600 are to be paid by the Claimant to the Appellant.